96-30

NO. _____

Supreme Court, U.S.
FILED
JUL 2 - 1996
OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term 1995

TONYA M. TINCH; et al.,
Petitioner,

v.

CITY OF DAYTON; et al.,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

***Dwight D. Brannon**
Dwight D. Brannon & Associates
124 East Third Street
Suite 100
Dayton, OH 45402
(513) 228-2306

**Attorney for Petitioner*

LEGAL ADVANTAGE - Appellate Service
432 Walnut Street * Suite 200 * Cincinnati, OH 45202
(800) 581-2252

227 pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1: In wrongful death cases arising under 42 U.S.C. §1983, should the United States Supreme Court adopt a clear and uniform standard of law that assures uniform application as to the parties who may recover, as well as the type and theory of damages available, in order to avoid the unequal application and incomplete remedies which occur in the different Circuits, as in the case at bar?

Question 1A: Under federal law, is it proper to allow or restrict different types and theories of damages, depending solely on the Circuit in which a violation of 42 U.S.C. §1983 takes place, thereby providing a complete remedy for such violations in only some Circuits?

Question 1B: Is it proper for the Sixth Circuit to issue inconsistent and conflicting legal authorities as to types and theories of damages available under wrongful death remedies pursuant to 42 U.S.C. § 1983?

Question 1C: Is it proper for the Sixth Circuit to rule that a 42 U.S.C. §1983 cause of action does not survive the death of a person killed in violation of said statute, or allow any recovery other than to the victim, personally?

Question 1D: Is it proper for the Sixth Circuit to rule that the surviving spouse and children cannot recover for their decedent's wrongful death occurring in violation of 42 U.S.C. §1983, as well as under state wrongful death and survivorship statutes, when

there are decisions within the Sixth Circuit, as well as other Circuits that provide for familial recovery?

Question 1E: Is it proper for the Sixth Circuit to find that an officer's in shooting and killing the decedent *was* the proximate cause of a constitutional violation, resulting in the death of the decedent, but that the same conduct *was not* the proximate cause of the wrongful death of the victim who was killed under the state wrongful death law?

Question 1F: Does wrongful death under 42 U.S.C. §1983 cause the same rights and remedies to accrue to the same beneficiaries as would accrue under the wrongful death statute of the state in which the death occurred?

QUESTION 2: Is it error to bifurcate the parties by removing the City of Dayton from the case and thereafter, refuse to bifurcate the issues involved in a civil rights-based wrongful death suit, only to inconsistently allow the bifurcation of the issues, after trial but just prior to argument (after prejudicial evidence had been introduced and presented to the jury)?

Question 2A: Is it proper to bifurcate a municipality from a 42 U.S.C. §1983 wrongful death suit when the evidence is uncontroverted that the municipality is totally lacking and/or clearly deficient in its policies and customs from which the constitutional tort of its officers resulted, especially when the officers testified that they were following the policies and acting as the municipality mandated (i.e., since there was no policy, then they couldn't have violated it)?

Question 2B: Is it proper to bifurcate and subsequently dismiss a municipality entirely without trial in violation of Fed. R. Civ. P. 19, when the jury obviously found that the City's lack of policies was an intervening, superseding, independent and proximate cause of the wrongful death?

Question 2C: Is it patent error for the trial court to inconsistently bifurcate issues at different points of a trial, where the last decision merely confirms the prejudice of the first ruling of the Court?

QUESTION 3: Under federal law, is it proper for the Court of Appeals to ignore material issues raised on appeal, which, by themselves, may be dispositive of the appeal, or to affirm prejudicial, inconsistent rulings of the District Court, misapplying its own precedent in the process?

PARTIES

1. For Petitioner: Tonya M. Tinch, Administratrix of the Estate of Scott E. Tinch; Individually as the surviving spouse of Scott E. Tinch; As Parent, guardian, and next friend of Amanda M. and Justin S. Tinch, Minors, Plaintiff-Appellant, Cross Appellee.

2. For Respondents: City of Dayton; Michael J. Sipes; Russell E. Neville; James E. Newby, Defendant-Appellees, Cross Appellant

TABLE OF CONTENTS

Page No.

Questions Presented for Review i

List of Parties to Proceedings in the Court Below iii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions, Treaties, Statutes, Rules and Regulations Involved 2

Statement of Case 4

Argument 11

QUESTION 1 11

QUESTION 2 18

QUESTION 3 24

Certificate of Service 28

Appendix: (separate table)

TABLE OF AUTHORITIES

CASES: **Page No.**

Adickes v. S.H. Kress & Co.,
398 U.S. 144, 167-168 (1970) 21

Beeck v. Aquaslide,
562 F.2d 537, 542 (8th Cir. 1977) 20

Berry v. City of Muskogee,
900 F.2d 1489, (10th Cir. 1990) 14, 16

City of Canton v. Harris,
109 S.Ct. 197 (1989) 21

City of St. Louis v. Praprotnik,
485 U.S. 112 (1988) 20

Bell v. City of Milwaukee,
746 F.2d 1205, 1239 (7th Cir. 1984) 15

Fantozzi v. Sandusky Cement Prod. Co.
(1992) 64 Ohio St.3d 601 18

Garner v. Memphis Police Dept.
8F3d 358 (6th Cir. 1993) 20

Gordon v. Norman
788 F.2d 1194 (6th Cir. 1986) 16

Graham v. Sauk Prairie Police Comm.
915 F2d 1085 (7th Cir. 1990) 16

Greene v. City of New York,
675 F.Supp. 110 (S.D.N.Y. 1987) 16

Hartzler v. Licking Co. Humane Society,
740 F.Supp. 470 (S.D. Ohio 1990) 25

Hopkins v. Andaya,
958 F.2d 881 (9th Cir. 1992) 20

Haynesworth v. Miller, 820 F.2d
1245, 1272, n.227 (D.C. Cir. 1987) 20

In re Beverly Hills Fir Litigation,
695 F.2d 207, 216 (6th Cir. 1982),
cert. denied, 461 U.S. 929, 103
S.Ct. 2090, 77 L.Ed. 300 (1983) 20

Jaco v. Bloechle,
739 F.2d 239 (6th Cir. 1984) 14,15

*Leatherman v. Tarrant County Narcotics
Inteiligence & Coordination Unit*,
113 S.Ct. 1160 (1993) 20

Monell v. Dept. of Social Services,
436 U.S. 658 (1978) 21,23

Newcomb v. City of Troy, 719 F.Supp.
1408, 1416-17 (E.D. Mich. 1989) 20

Osborne v. Lyles
(1992) 63 Ohio St.3d 326 23

Purnell v. City of Akron,
925 F.2d 941 (6th Cir. 1991) 13,14

Ramos v. Kuzas, 65 Ohio St.3d 42,
600 N.E. 2d 241 (1992) 17,18

Rivas v. Freeman,
940 F.2d 198 (11th Cir. 1991) 20

Robertson v. Wegman,
436 U.S. 584, 590-91 (1978) 14

Rymer v. Davis, 754 F.2d 198
(6th Cir. 1985), vacated on other grounds,
473 U.S. 90 (1986) 20

Samples v. City of Atlanta,
916 F.2d 1548 (11th Cir. 1990) 20

Smith v. City of Fontana,
818 F.2d 1411, 1417-20 (9th Cir. 1987) 13

State v. Willford,
(1990), 49 Ohio St.3d 247 6

Stengel v. Belcher,
522 F.2d 438, 444 (6th Cir. 1975) 16

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 15

Urseth v. City of Dayton,
No. C-3-84-103 (S.D. Ohio) 4,22

Ward v. City of San Jose, 967 F.2d
287 (9th Cir. 1992) modifying, 737
F.Supp. 1502, (N.D. Cal. 1990) 24,25

Weeks v. Chaboudy,
984 F.2d 185 (6th Cir. 1993) 16

ADDITIONAL AUTHORITY:

Fed. R. Civ. P. 19 19,21,22

Fed. R. Civ. P. 42 23,24

Fed. R. Civ. P. 50 25

Fed. R. Civ. P. 59 25

42 U.S.C. §1983 . . . . . throughout

Civil Rights and Civil Liberties
Litigation: The Law of Section 1983
§ 4.03 at 275 (3d ed. 1991) 15

Funk & Wagnallas, *Standard Desk Dictionary*,
New york, (1969), pp 122 & 135 17

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in Case No. 94-3436/3516 is unreported. The opinion of the United States District Court for the Southern District of Ohio, Western Division at Dayton, Case No. C-3-89-263, is unreported.

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Ohio, Western Division at Dayton, had jurisdiction over plaintiffs' claims pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(a)(3), and exercised supplemental or pendent jurisdiction over claims arising under state law, in particular Ohio R. C. 2125.02 and 2305.21 (wrongful death and survival actions). Jurisdiction over the parties existed, and venue was proper in the United States District Court for the Southern District of Ohio, Western Division at Dayton.

A final judgment was entered for and against the Plaintiff by the United States District Court for the Southern District of Ohio, Western Division at Dayton, on March 17, 1994, Thus, the Court of Appeals for the Sixth Circuit properly had jurisdiction in this case pursuant to 28 U.S.C. §1291.

Plaintiffs filed a timely notice of appeal in the United States District Court for the Southern District of Ohio, Western Division at Dayton, on April 15, 1994.

A final judgment was entered by Court of Appeals for the Sixth Circuit affirming in part and reversing in part the decision of the District Court, on February 20, 1996.[1]

---

[1]The Sixth Circuit, in a poorly written and reasoned opinion, egregiously mistook the facts and findings of the case. In particular, finding that no wrongful death action had been plead in the complaint, when ¶ 5 in the jurisdiction section of the complaint, as well as the

Plaintiff filed a timely Petition for Rehearing, which was denied on April 4, 1996. Thus, the Supreme Court of the United States has jurisdiction to review the judgment of the Sixth Circuit by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST., amend. V

No person shall ... shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST., amend. XIV, § 1

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

---

body, requested relief under O.R.C. § 2125.02 was blatant error. Further, in finding that the wife and twin children of the slain victim were not entitled to relief under the existing law, and under the complaint, nonetheless, because such relief had not been prayed for, the Court ignored the caption of the complaint (i.e., wife and children were Plaintiffs, and the wife was also administrator of the estate), and individual causes of action were plead. Further, along with many other errors, the Court incorrectly held that a wrongful death remedy from a 42 U.S.C. §1983 violation was only a personal action to the deceased. No wrongful death type of remedies were available.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Ohio CONST. Art. I, §19(A)

The amount of damages recoverable by civil action in the courts for the death caused by the wrongful act, neglect, or default of another, shall not be limited by law.

Ohio Revised Code §2125.01

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter...

Ohio Revised Code §2305.21

In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

STATEMENT OF THE CASE

On June 17, 1987, Russell Neville and Michael Sipes were undercover detectives for the Dayton Police Department. On that date, Vickie Grubbs, a known prostitute and convicted felon, who had allegedly been a previous informant for Det. Neville, telephoned for him on his voice pager and asked him to meet her at 2147-1/2 East Third Street in Dayton, Ohio, to provide assistance to her sister, Rhonda Grubbs, in a matter unrelated to police investigations, and certainly not in any undercover capacity. The detectives proceeded to the location requested. At that time they were shabbily dressed in blue jeans and t-shirts, and were "rough" looking. They were not recognizable as police officers, intending to be anonymous.

Michael Sipes had been an undercover officer for approximately four months and the only undercover training he had received was approximately two hours at the Dayton Police Academy some nine years earlier. Russell Neville received no training from the Dayton Police Academy for undercover work at all. In fact, the City of Dayton had no policies, procedures, rules, regulations, or training for undercover work. The City had deliberately failed to train in spite of numerous judgments for unconstitutional conduct of officers in undercover situations.[2]

Upon arriving at 2147-1/2 East Third Street, the detectives saw Rhonda Grubbs unconscious on the porch, stepped over her, and entered the kitchen of the house, where they were informed by one Jay Coover that Grubbs

---

[2]In particular, in *Urseth v. City of Dayton*, No. C-3-84-103 (S.D. Ohio), the same District Court found a similar absence of training policy and procedure in this regard, and the actions stemming therefrom unconstitutional, finding "Supervisory policy regarding the Organized Crime Unit of the Dayton Police Department...was so reckless or grossly negligent that future misconduct was almost inevitable or substantially certain to occur."

was in the back room. The detectives decided to do nothing but wait for her in the kitchen, without identifying themselves. They testified that they were just there, not expecting to perform any undercover operations.

On that same night two brothers, Shaun and Scott Tinch, were in the vicinity looking for a Robert Kinder. Shortly after Detectives Neville and Sipes arrived at 2147-1/2 East Third Street, Shaun Tinch entered the premises and proceeded to the back room to see Vickie Grubbs. Shaun believed that Ms. Grubbs knew the location of Robert Kinder. As Shaun entered the house the detectives noticed a bulge under his shirt, which was later identified to be a flashlight. At that time the officers did nothing and allowed Shaun to continue into the back room to see Grubbs. Immediately following this, Scott Tinch entered the kitchen. He was carrying a tool handle at his side. Scott Tinch approached Det. Neville and said, "what's happening....what's happening." He then proceeded to the back room where he stayed briefly, and then came back through the kitchen and exited the house. The detectives never identified themselves to Scott Tinch, and felt no need to take official action.

Shaun Tinch remained in the back room and argued with Vickie Grubbs for a short period of time. Grubbs and Shaun Tinch then entered the kitchen and Grubbs threatened to call the police. With some difficulty, she recognized Det. Neville and identified both Neville and Sipes as police officers to Shaun Tinch. At that point, both detectives identified themselves as Dayton Police officers to Shaun Tinch by revealing their badges and drawing their guns, pointing them at Shaun Tinch. Shaun Tinch immediately put his hands into the air and complied with the detectives' request to get on his knees with his hands behind his head. Det. Sipes removed a flashlight from Shaun's pants and placed his badge back into his pants pocket. At no time was

Shaun Tinch ever placed under arrest, as the officers acknowledged he committed no crime.

Scott Tinch was out of the house at this point and could not have heard this conversation. The detectives were well aware of his and others' presence in the neighborhood and failed to take any action to notify those others that they were police officers, or to secure the door. They failed to observe even the most basic standards of undercover operations required to protect innocent persons. Indeed, the officers, at trial, steadfastly asserted that they had a greater duty to maintain their cover or protect themselves than to prevent harm to others. Within seconds, Scott Tinch re-entered the house. With no way of knowing that Sipes and Neville were police officers, Scott Tinch could only see that his brother was on the floor and that two men were holding a gun to his head execution style. Shaun Tinch, as well as numerous independent witnesses, testified that neither Det. Neville nor Det. Sipes identified themselves as police officers to Scott Tinch. Scott Tinch proceeded to rush into the room to defend his brother, as provided under law.[3] Tinch grabbed Det. Sipes' arm as Neville struck him on the head with a gun. Tinch never struck the officer with the tool handle, but lost it as a result of the blow to the head or as the two wrestled to the ground. Shortly after Tinch and Sipes became involved in the struggle, and clearly after the tool handle was lost, Sipes fired a shot, killing Tinch. At the time the shot was fired, Sipes was in no danger for his life, and the two detectives could have easily overcome Tinch. Neither officer truthfully related the facts of the shooting, the position of the shot, and both an investigating officer and coroner deemed the shooting to be a "bad shoot". Even an

---

[3]O.J.I. §411.31 and *State v. Willford* (1990), 49 Ohio St.3d 247 provides the applicable rules on self defense, which the Court failed to instruct as requested by Plaintiffs.

attempt to introduce a knife not involved in the incident was made by the officers.

On June 19, 1989, Tonya Tinch, the surviving spouse of Scott Tinch, filed suit for wrongful death and other related state claims, as well as federal claims under concurrent state court jurisdiction of 42 U.S.C. §1983, on behalf of the estate of Scott Tinch, on behalf of herself individually, and on behalf of Amanda and Justin Tinch, the two minor children of Scott Tinch, simultaneously in state and U.S. District Court for the Southern District of Ohio, Western Division at Dayton. Named as Defendants were the City of Dayton, Russell Neville, Michael Sipes, City of Dayton Mayor and City Commissioners. The lawsuit was removed to federal court under the 42 U.S.C. §1983 claims, and all causes of action were tried in Federal District Court. Plaintiffs sought compensatory and punitive damages under 42 U.S.C. §1983, for violation of Scott Tinch's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment Rights, as well as supplemental state claims for wrongful death, survival and related causes of action. Plaintiffs' claims included excessive force against Neville and Sipes, and Plaintiffs' 42 U.S.C §1983 claims against the City of Dayton and Chief Newby for failure to train or to maintain a custom or policy for undercover work, directly and proximately resulting in the death of Scott Tinch. Plaintiffs' further sought punitive damages against Neville, Sipes and Newby, and for survival action against Neville, Sipes, Newby, and the City of Dayton. Plaintiffs proceeded to prepare their case for trial on the foregoing issues. The District Court allowed voluminous evidence regarding undercover policy and procedure, even after bifurcating the City and dismissing them from the case.[4]

---

[4]Indeed Plaintiffs' Expert Dr. Gary Marx testified extensively on the standards and the City and officer's deviations. After the City had perpetuated their expert, and he had in effect agreed with Plaintiffs, the

On September 18, 1990, Plaintiffs filed a motion for summary judgment. On May 14, 1992, a Decision was rendered by the trial court partially overruling Plaintiffs motion. The decision clarified the issues for the trial court and clearly recognized the factual and legal connections between the City's lack of policy and procedure on undercover operations and the officers alleged constitutional tort.[5] A trial date was scheduled for March 15, 1993, and no other motions were entertained.

On March 3, 1993, a mere week before the trial was scheduled to begin, Defendants moved to bifurcate the trial, separating the City of Dayton and the Municipal Defendant from the Detectives. Plaintiffs responded to Defendants' motion on March 12, 1993, and on the same date filed a motion to continue the trial if the bifurcation were allowed, because of the vast change in the theory of the case. The trial court granted Defendants' motion to bifurcate the trial and overruled Plaintiffs' motion to continue the trial.

Just prior to the trial, after adverse rulings on many critical, valid motions in limine, Plaintiffs made a motion to bifurcate the liability issues from the damage issues, because of the prejudices to the Plaintiffs of evidence of the decedent's past which had nothing to do with the liability issues. That motion was overruled and the Court erroneously admitted evidence on the damages issues that was prejudicial. Then, the Court unexpectedly bifurcated the liability and damage issues just prior to closing argument

---

City refused to introduce his testimony at trial. When Plaintiffs attempted to do so, the Court erroneously denied the introduction of the evidence. This too was assigned as error to the appellate court but was not addressed.

[5]The District Court found in its Opinion that the Plaintiffs "can make a very persuasive argument that this man didn't have to die, that he died because of the lack of a set of standards and a set of policies for those types of police officers because the lack of policy, the freelancing of the police officers, is what put them there in the first place where the incident could occur."

over the objection of Plaintiffs, allowing all the prejudicial matters that could only be conceivably justified on the damages issues. Plaintiffs had the worst of all worlds. The Court abused its discretion in its inconsistent bifurcation orders, which effectively dismissed a necessary party under Fed. R. Civ. P. 19.

On March 18, 1993, the jury trial began. On April 8, 1993, the jury returned a verdict against Michael Sipes for the constitutional tort of use of excessive force, and in a subsequent determination awarded the Plaintiffs the sum of $110,000.00 against Sipes on the 42 U.S.C. §1983 claim. The jury had requested further instruction on the wrongful death claim but was given erroneous and incomplete instructions by the Court. For various errors as discussed hereafter, the jury failed to award a verdict against any other Defendant or for any other causes of action. The resulting verdicts were patently inconsistent, exhibiting the jury had lost its way because of the errors committed. Plaintiffs immediately moved the court to alter or amend the clearly inconsistent judgment, for judgment notwithstanding the verdict, and for further relief, which the trial court overruled.

The District Court entered final judgment on April 21, 1993, affirming its rulings that allowed findings that the Plaintiffs could only recover for hedonic damage and pain and suffering damage on the constitutional tort of excessive force under the state survival action, and not for wrongful death or any other cause of action. Further, the neither spouse nor the children would be allowed damages on the constitutional claim.

Plaintiffs' thereafter filed formal motions for judgment notwithstanding the verdict, to alter or amend judgment, for a new trial, and other relief which was overruled by the trial court. Subsequent rulings on motions for attorney fees and other relief were also overruled, all to the extreme prejudice of Plaintiffs. Plaintiffs filed a Notice of Appeal on April 15, 1994, to the Sixth Circuit Court of

Appeals from the trial court's final judgment upon all said motions on March 17, 1994.[6]

In its opinion filed February 20, 1996, the Sixth Circuit affirmed in part the decision of the District Court, holding that the jury award of compensatory damages ($25,000) was proper, but also reversed in part at the request of the Defendants, holding that the damages awarded for Scott Tinch's loss of enjoyment of life ($86,000) were improper. The Sixth Circuit virtually ignored all the assignments of error, refused to address constitutional issues, and plainly missed who sued who for what in the case below. In reversing the latter damages award, the Court interpreted Ohio law as not supporting recovery for Scott Tinch's loss of enjoyment of life, arguing that no loss of enjoyment of life could have accrued in Scott Tinch's lifetime because Scott Tinch died virtually instantaneously and thus was apparently not cognizant of the loss. The Court thereby established a precedent that officers who commit constitutional torts could mitigate their damages by causing death, instead of merely injury, that a victim is only entitled to pain and suffering (personal damage), that the spouse and children should not recover under 42 U.S.C. §1983, or even under Ohio's wrongful death statute, which clearly provides to the contrary.

Plaintiff filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc, which was denied by the

---

[6]The Court in a ruling on fees stayed the consideration of same until after the appeal, but made it clear counsel could receive much less in fees than reasonably expected because of the trial court's ruling and possible adverse rulings by the appellate court. The Decision included a lengthy attempt to distinguish the Court's position on bifurcation of the City in its previous summary judgment motion, and its decision at trial. It further was intended to either warn or inhibit the Plaintiff about the appellate process. So far the Court has been right about the dangers of appeal. A bad decision got worse.

Sixth Circuit Court of Appeals on April 4, 1996. Regrettably, again the record and salient errors were ignored.

ARGUMENT

Counsel for Petitioner wishes to express a strongly held belief, based on a reasoned and studied professional judgment, that the decision of the Sixth Circuit in the case at bar is contrary to decisions of other Federal Circuit Courts, the Sixth Circuit itself, and the Supreme Court of the United States, and incorrectly interprets material matters of state and federal law. Therefore, certiorari must be granted by the Supreme Court of the United States via this petition to secure and maintain uniformity of decisions, within the Sixth Circuit, as well as among all Circuits. There especially must be uniformity upon the issues of who is a proper plaintiff (estate, spouse, children, etc.), appropriate joinder of a municipality, the damages available when a constitutional tort results in the death of a citizen, and reconciliation of how any jury could find an officer guilty of excessive force in causing the death of an individual, but not responsible for his wrongful death, and making the damages awarded under 42 U.S.C. §1983 limited to only a personal survival action. If there exists any important areas of the law that this great Court needs to address, they are the ones at issue in the case at bar. Thousands of victims, and their prospective attorneys, need clarification on these issues. To delay is to ensure many claims will go unredressed and the protection of the law will deteriorate.

QUESTION 1: In wrongful death cases arising under 42 U.S.C. §1983, should the United States Supreme Court adopt a clear and uniform standard of law that assures

uniform application as to the parties who may recover, as well as the type and theory of damages available, in order to avoid the unequal application and incomplete remedies which occur in the different Circuits, as in the case at bar?

Question 1A: Under federal law, is it proper to allow or restrict different types and theories of damages, depending solely on the Circuit in which a violation of 42 U.S.C. §1983 takes place, thereby providing a complete remedy for such violations in only some Circuits?

Question 1B: Is it proper for the Sixth Circuit to issue inconsistent and conflicting legal authorities as to types and theories of damages available under wrongful death remedies pursuant to 42 U.S.C. § 1983?

Question 1C: Is it proper for the Sixth Circuit to rule that a 42 U.S.C. §1983 cause of action does not survive the death of a person killed in violation of said statute, or allow any recovery other than to the victim, personally?

Question 1D: Is it proper for the Sixth Circuit to rule that the surviving spouse and children cannot recover for their decedent's wrongful death occurring in violation of 42 U.S.C. §1983, as well as under state wrongful death and survivorship statutes, when there are decisions within the Sixth Circuit, as well as other Circuits that provide for familial recovery?

Question 1E: Is it proper for the Sixth Circuit to find that an officer's in shooting and killing the decedent *was* the proximate cause of a constitutional violation, resulting in the death of the decedent, but

that the same conduct *was not* the proximate cause of the wrongful death of the victim who was killed under the state wrongful death statute?

Question 1F: Does wrongful death under 42 U.S.C. §1983 cause the same rights and remedies to accrue to the same beneficiaries as would accrue under the wrongful death statute of the state in which the death occurred?

In its decision, the Sixth Circuit failed to recognize and uphold Plaintiffs' established rights as surviving family members to maintain an independent action for damages under 42 U.S.C. §1983, and for deprivation of a constitutional liberty interest in a continuing familial relationship. *See, e.g., Smith v. City of Fontana*, 818 F.2d 1411, 1417-20 (9th Cir. 1987); *Greene v. City of New York*, 675 F. Supp. 110 (S.D.N.Y. 1987). In dismissing these claims, the Sixth Circuit incredulously stated that Plaintiffs had waived their rights by not inserting them in the Complaint, citing *Purnell v. City of Akron*, 925 F.2d 941 (6th Cir. 1991). However, the Sixth Circuit misapplied *Purnell* and ignored both federal and state law.

This was a bold-face error. The complaint even cites the Ohio wrongful death statute in its body at O.R.C. §2125.02, and the pleadings are consistent with it. The caption clearly includes not only the estate (which includes the wife and children under Ohio's wrongful death law), but also included Tonya Tinch as wife and next friend Justin Tinch, Amanda Tinch the twin children individually. The Sixth Circuit must not have even read the Complaint! Did the Sixth Circuit overlook the fact that this case originated in the state court, under state law (state wrongful death), and was removed to federal court by the Defendants? Further, application of Art. I, §19(A) of the Ohio Constitution on wrongful death was completely ignored.

First, *Purnell* is not even comparable to the case at bar, because the original action therein was brought on behalf of the decedent's estate and two persons claiming to be the decedent's illegitimate children who attempted to intervene. *Id.* at 942. Moreover, the court in *Purnell* found that nothing in the record, including the parties' briefs, suggested that the spouse and children were seeking damages for the violation of the father's constitutional rights. *Id.* at 948. By contrast, in the present case, Tonya, Justin and Amanda Tinch have consistently asserted, in their Complaint, at trial, in their briefs, and in all court conferences, that they were entitled to recover under 42 U.S.C. §1983 for the deprivation of their liberty interest in a continuing familial relationship, due to the Defendants' unconstitutional acts. Consequently, *Purnell* is not applicable, and the Sixth Circuit misapplied the law in rejecting Plaintiffs' claims under *Purnell*, without discussion, having not really reviewed the pleadings. This is, needless to say to this High Court, reversible error in itself, and a mandate to grant certiorari to assure the appellate courts are not abdicating their duties.

In the case at bar, the Sixth Circuit incorrectly held state law controlling on the issue of damages recoverable under 42 U.S.C. §1983. This decision created an inconsistency not only with decisions in other Circuits, but also inconsistent with previous Sixth Circuit authority. In addition, the Sixth Circuit misapplied Ohio law by finding that hedonic or wrongful death damages were not recoverable by Plaintiffs.

Federal authority does mandate that a uniform rule should be adopted for damages in 42 U.S.C §1983 actions where the wrongful acts resulted in the death of the party whose civil rights were violated. *See, Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), *Robertson v. Wegman*, 436 U.S. 584, 590-91 (1978). Despite this, the Sixth Circuit incorrectly applied *Jaco v. Bloechle*, 739 F.2d

239 (6th Cir. 1984), to limit Plaintiffs' recovery to only Scott Tinch's conscious pain and suffering before his death.

First, contrary to the Sixth Circuit's assertion, *Jaco* did not hold that state law determined the damages to be awarded for violations of civil rights. Rather, in *Jaco*, the Sixth Circuit simply resorted to the use of state law to determine the survival of the action and the standing of the personal representative. *Id.* at 244-45. After doing so, the *Jaco* Court found that the Ohio survival statute, which would not allow the survival of a 42 U.S.C. §1983 action, was hostile to the Constitution and laws of the United States, and therefore could not be applied. *Id.* Therefore, any argument that *Jaco* precludes the recovery of hedonic damages in 42 U.S.C. §1983 actions or denies recovery under state wrongful death statutes is unsupported by that decision. In fact, *Jaco* is properly viewed as a rejection of the argument that Ohio's survival statute can control the survival or other available damages in a 42 U.S.C. §1983 case.

Also contrary to the Sixth Circuit's decision, is the well-recognized principle that "...neither the forum state's common law nor general common law is determinative for damage purposes...". S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 4.03 at 275 (3d ed. 1991). Instead, the measure of damages available under 42 U.S.C. §1983 is controlled by federal law, not state law, as this Court made clear many years ago. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (stating that "compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988" and that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes). The weight of authority further reveals that a court has the leeway to structure an appropriate federal remedy whenever a federal right is impaired. *E.g., Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984) (holding that victim's estate

could recover loss-of-life damages even though Wisconsin law did not permit a victim's estate to recover such damages); *Graham v. Sauk Prairie Police Commission*, 915 F.2d 1085 (7th Cir. 1990) (stating that availability of loss-of-life damages should not vary from state to state depending on state indemnification rules).

In this regard as well, the Sixth Circuit also misapplied its own precedent. For example, in *Weeks v. Chaboudy*, 984 F.2d 185 (6th Cir. 1993), the Sixth Circuit held that federal, not Ohio, joint and several liability damages rules applied in 42 U.S.C. §1983 cases. Significantly, the court found that a "federal rule" regarding damages could be found not only in statutes or Supreme Court decisions, but also in the decisions of other federal courts. *Id.* at 189; *see also*, *Gordon v. Norman*, 788 F.2d 1194 (6th Cir. 1986) (holding that federal standards govern the determination of damages under the civil rights statutes, and rejecting the assertion that an award of punitive damages should be limited by application of Tennessee law); *Stengel v. Belcher*, 522 F.2d 438, 444 (6th Cir. 1975).

The reason for a common standard is seemingly obvious -- a life should not be worth less in one state than it is in another. Providing inconsistent remedies among the Circuits, however, has just this macabre "valuation of life depending on locale" effect. In *Berry*, the court specifically rejected such an approach, asserting:

> If we were to define §1983 remedies in terms of the state survival action, supplemented by the state wrongful death act, we place into the hands of the state the decision as to allocation of recovery in a §1983 case, and, indeed, whether there can be any recovery at all.

Berry, 900 F.2d at 1506. Thus, the court held that a federal common law of remedies for 42 U.S.C. §1983 violations

should be fashioned to create a uniform rule. Included in this remedy were appropriate compensatory damages such as "...medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had not the injury occurred, the victim's loss of consortium, and other damages recognized in common law tort actions." *Id.* at 1507. The court noted that state wrongful death claims would not be foreclosed and would still remain viable, but that no duplicate recoveries would be permitted. The trial and appellate courts ignored these claims. Justice requires uniformity among the Circuits.

The Sixth Circuit should have followed the law of the land and allowed a full recovery for violation of Scott Tinch's constitutional rights. At the very least, the divergent holdings between the Sixth and Tenth Circuits, as shown herein, demonstrates the particularized need for this Court to grant certiorari. Again, one person victimized by those acting under color of authority should not have his or her loss valued higher than anothers simply because of which federal circuit they happened to be in at the time of the incident. The incorrect nature of the Sixth Circuit's approach in the present case is further demonstrated by the fact that the Court affirmed recovery of $25,000 for Tinch's conscious pain and suffering, but rejected the $86,000 award for Tinch's loss of enjoyment of life. The Sixth Circuit's reasoning was that Tinch allegedly was not cognizant of his loss because his death was "virtually instantaneous." Logically, however, how could Scott Tinch have had conscious pain and suffering without being cognizant of same, given the fact that these two words mean the same thing? Funk & Wagnalls, *Standard Desk Dictionary*, New York, (1969), pp. 122 and 135.

In addition, the Sixth Circuit's interpretation of Ohio law was plainly wrong. For example, the panel cited *Ramos v. Kuzas*, 65 Ohio St.3d 42, 600 N.E.2d 241 (1992), for the proposition that a newborn cannot suffer hedonic

damages because he or she cannot be cognizant of the loss of enjoyment of life. However, the *Ramos* court instead held that a newborn could not suffer these kinds of damages because she had not yet had time to "develop an ability to perform a pleasurable activity or hobby specifically identified to his or her lifestyle." *Ramos*, 65 Ohio St.3d at 44. Thus, the Court's decision in *Ramos* was not premised on whether the injured party was conscious or unconscious at the time of the injury or death, but was instead based on whether a previous opportunity existed for developing an ability to perform pleasurable activities. The Court ignored the clear law of Ohio as set forth in *Fantozzi v. Sandusky Cement Prod. Co.* (1992), 64 Ohio St.3d 601. Clearly, Scott Tinch, being an adult, had time to develop such abilities as was testified to at trial, and should have been permitted recovery for loss of enjoyment of life. On this issue the trial court was correct. The Sixth Court simply created error on error, making the decedent's life to himself, his spouse and twin children, worth but $25,000, a paltry sum at best.

Based on the foregoing, certiorari is needed because the Sixth Circuit overlooked and misapplied material matters of law, because of the conflict between this decision and principles previously established in the Sixth and other Circuits and because the Sixth Circuit completely misapplied Ohio law.

QUESTION 2: Is it error to bifurcate the parties by removing the City of Dayton from the case and thereafter, refuse to bifurcate the issues involved in a civil rights-based wrongful death suit, only to inconsistently allow the bifurcation of the issues, after trial but just prior to argument (after prejudicial evidence had been introduced and presented to the jury)?

Question 2A: Is it proper to bifurcate a municipality from a 42 U.S.C. §1983 wrongful death suit when

the evidence is uncontroverted that the municipality is totally lacking and/or clearly deficient in its policies and customs from which the constitutional tort of its officers resulted, especially when the officers testified that they were following the policies and acting as the municipality mandated (i.e., since there was no policy, then they couldn't have violated it)?

Question 2B: Is it proper to bifurcate and subsequently dismiss a municipality entirely without trial in violation of Fed. R. Civ. P. 19, when the jury obviously found that the City's lack of policies was an intervening, superseding, independent and proximate cause of the wrongful death?

Question 2C: Is it patent error for the trial court to inconsistently bifurcate issues at different points of a trial, where the last decision merely confirms the prejudice of the first ruling of the Court?

As previously described, on March 3, 1993, a mere week before the trial was scheduled to begin, Defendants moved to bifurcate the City from the trial. Plaintiffs responded to Defendants' motion on March 12, 1993, and on the same date filed a motion to continue the trial if the bifurcation were allowed. The trial court granted Defendants' motion to bifurcate the City from the case, separating the claims against the Defendant officers and claims against the City of Dayton and the other municipal Defendants, and overruled Plaintiffs' motion to continue the trial. Then, just prior to the trial, after several adverse rulings on motions in limine, the Plaintiffs made a motion to the Court to bifurcate the liability-issues from the damages issues, which was overruled. The District Court later bifurcated the same liability and damage issues just prior to closing argument,

over the objection of Plaintiffs. The prejudice had already occurred.

The Sixth Circuit erred in ruling that the District Court did not abuse its discretion when it bifurcated the trial as to the separate defendants. Bifurcation is indeed an abuse of discretion if it has the potential to prejudice the parties, confuse the jury, or make the proceedings more inconvenient through two separate trials. *See, In re Beverly Hills Fire Litigation,* 695 F.2d 207, 216 (6th Cir. 1982), *cert. denied,* 461 U.S. 929, 103 S.Ct. 2090, 77 L.Ed. 300 (1983); *Beeck v. Aquaslide,* 562 F.2d 537, 542 (8th Cir. 1977).

The bifurcation of the municipality from officers under similar facts in the Sixth Circuit is in conflict with the Supreme Court and the law in other Circuits. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 113 S.Ct. 1160 (1993); *Hopkins v. Andaya,* 958 F.2d 881 (9th Cir. 1992); *Rivas v. Freeman,* 940 F.2d 1491 (11th Cir. 1991); *Haynesworth v. Miller,* 820 F.2d 1245, 1272 n.227 (D.C. Cir. 1987); and even within the Sixth Circuit in *Newcomb v. City of Troy,* 719 F.Supp. 1408, 1416-17 (E.D. Mich. 1989); *Garner v. Memphis Police Department,* 8 F.3d 358 (6th Cir. 1993); *Rymer v. Davis,* 754 F.2d 198 (6th Cir. 1985), vacated on other grounds, 473 U.S. 90 (1986). On those occasions that bifurcation has been allowed, the facts were totally inopposite and the factual underpinnings were not, as at bar, indistinguishably woven together.

In other Circuits, when bifurcation is allowed, the liability of the municipality does not automatically disappear. *Samples v. City of Atlanta,* 916 F.2d 1548 (11th Cir. 1990); *City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988)[7].

---

[7]At Footnote 24, the Court held: "First, whatever analysis is used to identify municipal policy makers, egregious attempts by local government to insulate themselves from liability for unconstitutional policies are precluded by a separate doctrine. Relying on the language of §1983, the Court has long recognized that a Plaintiff may be able to

The bifurcation of the City of Dayton and the other municipal Defendants from the police officers served to eliminate the City of Dayton from the lawsuit, because it was dismissed shortly after verdict. This, in turn, eliminated a necessary party to the action, in violation of Fed. R. Civ. P. 19, which states:

> A person...shall be joined as a party in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19 (emphasis added). Contrary to the opinion of the Sixth Circuit, this greatly prejudiced Plaintiffs, not only because, as even the Sixth Circuit agreed, each Defendant was necessary to the other, but also because the Plaintiff had much to achieve "...beyond a fruitless waste of judicial resources by proceeding against the municipal Defendants." Sixth Circuit Opinion, p. 8. The lack of City policies with regard to undercover police officers and excessive use of force were shown to be

---

prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a custom or usage' with the force of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970). That principle, which has not been affected by *Monell* or subsequent cases, ensures that most deliberate municipal evasions of the Constitution will be sharply limited." The lack of policy and custom, as in the case at bar, is well established as a basis for municipal liability. *City of Canton v. Harris*, 109 S.Ct. 197 (1989).

extremely lacking or non-existent The City was in a position to be admonished publicly through a damage award, thereby prompting them to "clean up their act"[8] for the safety and welfare of the citizens of Dayton. However, because the City was dismissed without repercussions of any kind, the Plaintiff was prejudiced in that a primary focus of her litigation was eliminated (i.e., changing the undercover policies of the City of Dayton for the future protection of its citizens and officers) and also because the case lost its direction under the unique facts without this principal defendant.[9]

Bifurcation provided an inherent defense to the officers who could contend that if they were wrong it was the City's, not their own, fault. The City's empty chair at trial allowing the defense to point at and argue to the jury that the City was the real cause, in fact, of all constitutional violations virtually assured as a disastrous result for the Plaintiffs' claims as the City's absence of policy assured Scott Tinch's death on May 17, 1987. Furthermore, this inconsistent application of 42 U.S.C. §1983, i.e., sometimes excluding the municipality and sometimes not, allows situations such as the one in the case at bar, where a mandatory party under Fed. R. Civ. P. 19 is dismissed and never held accountable for their blatant 42 U.S.C. §1983 violations, i.e., their policy and custom of not training undercover police officers. To allow this type of bifurcation and immediate subsequent dismissal effectively guarantees

---

[8]See Urseth, *supra*. The City of Dayton has still not established undercover policies and procedures, assuring future constitutional violations.

[9]The District Court's ruling on Plaintiffs' motion for summary judgment pointed to the policy issue as being the moving force for this unlawful death (Opinion, May 14, 1992). What remedy would ever be available for an officer who commits a 42 U.S.C. §1983 violation solely because of the City's inaction? How could the officer be protected in the future, or a meaningful remedy of the underlying tort provided? The injunctive relief here sought was totally ignored.

that the municipal Defendant in cases such as the one at bar always "walks," never being held accountable for the civil rights violations of its subordinates against its citizens. The entire remedial reason for the existence of 42 U.S.C. §1983 is emasculated by such bifurcation under facts as at bar, and is specifically prohibited by Ohio law.[10] This troublesome inconsistency needs to be addressed upon the granting of this Petition.

The second bifurcation, in which the District Court overruled Plaintiffs' motion to separate the damages and liability issues prior to trial, and then did exactly that before closing arguments, after prejudicial evidence had been introduced and presented to the jury, was not even addressed by the Sixth Circuit.[11] The inconsistent application of Fed. R. Civ. P. 42 was but one example of the disparate application of the law throughout the trial toward Plaintiffs, evidencing an abuse of judicial discretion. Again, this bifurcation after prejudicial evidence had been introduced and presented to the jury, served to be extremely prejudicial to the Plaintiffs, and was plain error which the Sixth Circuit chose not to discuss. Because these errors prejudiced the Plaintiffs, and were ignored or addressed in error by the Sixth Circuit, certiorari should be granted to instruct the Sixth Circuit on the issues of bifurcating both parties and issues, and their importance in the instant case. Certainly the

---

[10]The bifurcation also was contrary to the Ohio State Supreme Court's ruling in *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, which allowed the municipality to be liable for a constitutional tort of an "off-duty" officer under the doctrine of *respondeat superior*. This is not inconsistent with *Monell v. Department of Social Services*, 436 U.S. 658 (1978), as it is an additional state remedy for violation of civil rights. The courts below never even addressed this critical issue, though properly raised in both forums.

[11]The Assignments of Error at pages ii and xvi, discussed at pages 26-45 of the Appellants Sixth Circuit Brief, when compared to the Decision of the Sixth Circuit, shows the appellate court simply ignored this and many other issues raised on appeal.

same standard for bifurcation under Fed. R. Civ. P. 42 should be maintained throughout the proceedings and applied equally to Plaintiffs as to Defendants.

QUESTION 3: Under federal law, is it proper for the Court of Appeals to ignore material issues raised on appeal, which, by themselves, may be dispositive of the appeal, or to affirm prejudicial, inconsistent rulings of the District Court, misapplying its own precedent in the process?

In its opinion, the Sixth Circuit did not address the issue of inconsistency in verdicts, but only commented that objections to the instruction on proximate cause had been waived. Although Plaintiffs strongly disagree with this position, the fact is that even if one assumes the validity of the proximate cause ruling, the verdicts in this case were clearly and inherently inconsistent and required retrial of the state wrongful death and survival claims. Because the Sixth Circuit's decision failed to even address this material issue, certiorari should be granted.

In *Ward v. City of San Jose*, 967 F. 2d 287 (9th Cir. 1992), *modifying* 737 F. Supp. 1502 (N.D. Cal. 1990), the Ninth Circuit Court of Appeals faced an inconsistent verdict analytically identical to the verdict involved in the case at bar. In that case, the plaintiff's decedent was shot and killed by a police officer participating in a raid on a neighbor's house. The jury found that the defendant officer's use of force violated the decedent's constitutional rights. *Ward*, 737 F. Supp. at 1505.

Although the district court in *Ward* properly did not require a finding of proximate cause for the 42 U.S.C. § 1983 claim, the verdict form required the jury to find proximate cause before it could impose wrongful death liability, since such liability could be established by mere negligence. Moreover, although the jury found the defendant liable under 42 U.S.C. §1983 for violating the

decedent's Fourth Amendment rights, the jury found, in connection with the state wrongful death claim, that the officers' negligence was not a proximate cause of the decedent's death. *Ward*, 967 F.2d at 286. The court of appeals held that the inconsistency between these two verdicts required remand of the state wrongful death claim. *Id.* at 286-87. *See also, Hartzler v. Licking County Humane Society*, 740 F. Supp. 470 (S.D. Ohio 1990).

As in *Ward*, the jury in the instant case found that defendant Sipes had violated the decedent's Fourth Amendment rights by using unreasonable force. The jury further found that both Sipes and Neville acted with a degree of culpability sufficient to impose liability under the wrongful death statute. The jury's verdict that the same identical use of force was not the proximate cause of Scott Tinch's death for purposes of the state wrongful death claim is therefore clearly inconsistent with the verdict of liability on the 42 U.S.C. §1983 claim.[12] However, the Sixth Circuit overlooked this material point in its ruling and the law as exemplified by the *Ward* decision. Instead, the Court focused on the issue of proximate cause and waiver and did not address the merits of the argument on inconsistent verdicts. Indeed the assignments of errors for all rulings on post-trial motions were completely ignored by the Sixth Circuit. Such evisceration of the letter and spirit of the Fed. R. Civ. P. 50 and 59 cannot be tolerated. Consequently,

---

[12]Again, the attempt to place the absent Defendant, City of Dayton, as the proximate cause of the officers' conduct is the only rational explanation, and exhibits the confusion created by the erroneous rulings of the Court on bifurcation. Further, the proximate result of the wrongfully-fired bullet, causing the death, could not have been an issue of fact in this case. It was clearly the uncontested cause of death and the basis for finding a violation of 42 U.S.C. §1983. The application of any law anywhere in the United States makes this a wrongful death ex lege as well as de facto..

certiorari should be granted to do justice in the case at bar and insure conformity of such matters.

The Sixth Circuit further failed to address the issue of evidence destruction by Defendants' counsel in the case at bar. Use of Force reports concerning Defendants Neville and Sipes were destroyed during the pendency of the litigation. Although stating that it was troubled to learn of the destruction of the documents, the District Court was incredulously unable to find appropriate resolution to the issue, stating, unbelievably, that it could not conceive of a way to "level the playing field." Plaintiffs argued to the Sixth Circuit that it was error for the court to refuse to support an adverse evidentiary inference, at the very least, against the Defendants, to serve as some sort of curative measure. Along with the bifurcation issue, addressed *supra,* the Sixth Circuit's failure to address this issue, which served to be extremely prejudicial to Plaintiffs, was an error which needs to be addressed by this Court upon granting this petition. A strong message should be sent that the destruction of potentially dispositive and damaging evidence should never be countenanced in a system designed to guarantee and promote the achievement of fair justice and compensation.

The appellate court also failed to address or make legal rulings on at least nine other errors alleged to have been committed by the District Court.[13] Plaintiffs assign these omissions as proof that the appellate court denied Plaintiffs their constitutional right of review. An unjust trial without proper review mandates a grant of certiorari.

---

[13]See 6th Circuit Appellate Brief at ii, iii, and again at xvi, and specifically addressed at pages 28 through 49. The Appellant is entitled to a decision and answers to these very pertinent and necessary assignments of error. Even if Plaintiffs lost, they should at least be heard. To date, Plaintiffs have been denied not only a meaningful remedy but a meaningful hearing, having won the case only to lose on all meaningful remedial matters.

Plaintiffs are mindful of the admonition that, should this Honorable Court grant certiorari, an appeal to this Court is not a vehicle to reargue the merits of the case. However, Plaintiffs believe the entirety of the Sixth Circuit's decision is incorrect, with the exception of the ruling affirming Plaintiffs' rights to pain and suffering damages.[14] Consequently, Plaintiffs assert that all issues addressed *supra*, excepting that issue, need to be addressed, and therefore certiorari should be granted to Plaintiffs in the case at bar.

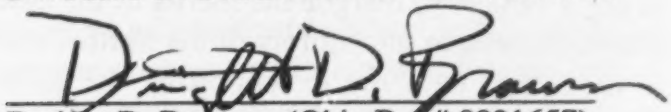
For the foregoing reasons, Plaintiffs respectfully request that the Petition for Writ of Certiorari be granted. Plaintiffs' request is based on the argument set forth *supra*, especially the conflict between the Sixth Circuit's decision in this case and conflicting decisions of the Sixth and other Circuits regarding proper parties and damages under 42 U.S.C. §1983. It is critical and in the best interest of the people of the United States that uniformity in this regard be achieved. The case at bar represents one of the grossest miscarriages of justice imaginable. The attempt to solicit the federal courts below for a meaningful remedy under the law has failed without any clear understanding as to why. The distant principles by which the Plaintiffs have been denied due process must be addressed and artificial barriers replaced by clearly marked gates as to parties, causes of action, and damages available. Consequently, Plaintiffs pray that this Honorable Court grant Certiorari in the case at bar.

---

[14]Had Scott Tinch not lived but an instant, there would be no recovery at all under the lower courts' rulings. Can that possibly be the appropriate application of 42 U.S.C. §1983 to these facts?

Respectfully Submitted,

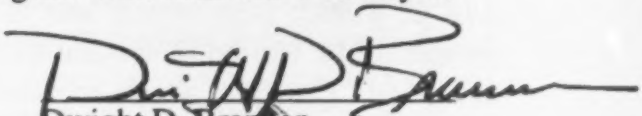
DWIGHT D. BRANNON & ASSOCIATES



Dwight D. Brannon (Ohio Bar # 0021657)
124 E. Third Street, Suite 100
Dayton, Ohio 45402
(513) 228-2306
Attorney for Plaintiffs/Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been served upon Neil F. Freund, Attorney for Defendants/Respondents, 1800 Dayton Arcade Centre, Dayton, Ohio 45402, by regular U.S. mail this 2nd day of July, 1996.



Dwight D. Brannon